

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CALVIN SISTRUNK,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 250683
Wayne Circuit Court
LC No. 03-001006-01

Before: Schuette, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of attempted possession with intent to deliver less than fifty grams of heroin. MCL 333.7401(2)(a)(iv). The case arose when police officers responded to a citizen complaint and observed defendant flee inside an abandoned house. The police pursued defendant into the house and retrieved bags of suspected heroin from his person. We affirm.

I. FACTS

Detroit Police Officer Dawn Engle testified that at approximately 7:15 p.m. on December 10, 2002, she encountered defendant in front of a house in Detroit. She and her partner, Officer Puryear, went to the house to back up Detroit Police Officer Matt Fulks and his partner, Officer Shawn Reed, in response to a citizen complaint regarding narcotics trafficking. Officer Engle testified that the house was vacant. When the police pulled up to the house, defendant fled inside. Officer Engle testified that Officer Reed ran after defendant, followed by Officer Engle and Officer Fulks. Officer Engle watched the back of the building, so she did not observe defendant’s arrest. Officer Engle testified that she did not recall anyone else being in the building at the time.

Officer Fulks also testified that he arrived at the house at approximately 7:15 p.m. on December 10, 2002, in response to a citizen complaint, and that the house was abandoned and had broken or boarded windows and illegal electrical hookup. Officer Fulks testified that his partner’s observations of defendant started a “short foot chase” that resulted in defendant being inside the house. Officer Fulks testified that he arrived “less than 30 seconds” after his partner. When Officer Fulks joined his partner inside the house, he “detained the defendant and inside the location [he] further recovered suspected narcotics from [defendant’s] right pants pocket.” The suspected narcotics consisted of “one baggie containing loose pieces of suspected heroin [sic]

and one baggie containing 40 ziplocks containing suspected” heroin. Officer Fulks placed the evidence in a lock seal folder and conveyed it to a narcotics laboratory for analysis. Officer Fulks read into evidence the laboratory analysis, which stated that the first bag contained 1.88 grams of heroin and that four of the forty individual baggies were tested and found to contain a total of 0.21 grams of heroin. The analyses were admitted into evidence with no objection.

The trial court found defendant guilty of attempted possession with intent to deliver heroin. On July 22, 2003, the trial court sentenced defendant to 1 to 20 years’ imprisonment, to run concurrently to the sentence in another case. This appeal followed.

II. HEARSAY

Defendant argues that the only evidence identifying the substance retrieved from his person as being heroin was hearsay that was improperly admitted. However, defendant indicated at his preliminary examination that he would stipulate that he would not be challenging the laboratory analysis that identified the nature and amount of the substance recovered. Thus, the issue is waived. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001) (“A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal.”).

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that counsel was ineffective for failing to raise a hearsay objection to the admission of the laboratory report. We disagree.

A. Standard of Review

Our review is limited to the record because defendant did not raise this issue below. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

B. Analysis

Defendant argues that a reasonably competent practitioner would have known that the reports were inadmissible hearsay. However, “failure to raise every conceivable issue does not constitute ineffective assistance of counsel.” *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Indeed, the decision to not challenge the nature and amount of the substance recovered seem to be just the type of strategic trial decision this Court is loath to second guess. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We see no reason to question this reasonable trial strategy on appeal.

IV. SUFFICIENCY OF THE EVIDENCE

We also reject defendant’s argument that there was insufficient evidence of possession and intent to deliver to support his conviction.

A. Standard of Review

We review a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

B. Analysis

There was police testimony that the baggies containing heroin were from defendant's person, which satisfies the requirement of possession. *People v Wolfe*, 440 Mich 508, 519-521; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, the individual packaging of the substance and the lack of any paraphernalia associated with personal use could allow a rational trier of fact to conclude that defendant intended to sell it. *Id.* at 524-526.

V. DISMISSAL

Defendant also argues that the trial court should have granted a dismissal instead of granting the prosecution repeated adjournments so that the prosecutor could obtain a police officer's testimony. Again, we disagree.

A. Standard of Review

A trial court's decision on a motion for an adjournment by the prosecution is reviewed for an abuse of discretion. *People v Grace*, 258 Mich App 274, 276; 671 NW2d 554 (2003). The trial court has the discretion to grant an adjournment because a witness is unavailable if the court finds the evidence material and if the court finds that the prosecution diligently attempted to produce the witness. *Id.* at 276, citing MCR 2.503(C)(2).

B. Analysis

The prosecutor's repeated attempts to procure the officer were diligent and the officer's testimony was material.

VI. DUE PROCESS

Finally, defendant argues that his due process rights were violated because the police recycled a videotape recording of his arrest. We disagree.

A. Standard of Review

We review de novo issues concerning due process violations. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001). "Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

B. Analysis

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective

of the good faith or bad faith of the prosecution.” *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, “the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial” is insufficient. *United States v Agurs*, 427 US 97, 109-110; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Further, “[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

“Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense.” *California v Trombetta*, 467 US 479, 488; 104 S Ct 2528; 81 L Ed 2d 413 (1984). In particular, the “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 489. Presumably, defendant could not obtain a similar videotape elsewhere. However, the alleged exculpatory value of the videotape is predicated on the fact that an eyewitness presented testimony at trial that conflicted with testimony from the police officers.¹ Moreover, it appears that the tape was recycled pursuant to a routine policy. We have held that “the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal.” *Johnson, supra* at 365. Accordingly, defendant’s due process challenge fails.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O’Connell

¹ Because the videotape could support the officers’ testimony as plausibly as it could support the eyewitness’s testimony, the tape is not obviously exculpatory even in retrospect.